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No. 690

JOINT BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1946

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.,

Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 31, 1946.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
QUESTIONS PRESENTED	1
STATEMENT	2
1. The Original Decision of this Court	2
2. Subsequent Proceedings Below	4
3. How the Case Comes Up	5
SUMMARY OF ARGUMENT AND SPECIFICATION OF ERRORS	6
ARGUMENT	6
1. The Judgment of this Court Closed the Controversy	6
2. Apart from Point 1, a Plan under Section 77 Becomes Final when Orders Approving and Confirming It are Finally Affirmed on Appeal	15
3. Apart from Points 1 and 2, the Debtor's Petition, if Permissible at all, was a Petition for Rehearing and the District Court's Denial of it was Not Appealable, and in any case such Denial was Plainly Right	20
CONCLUSION	30

TABLE OF CASES

Page

Atchison, Topeka & Santa Fe R. v. United States, 284 U. S. 248 (1932) 23

Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522 (1931) 14

Bates v. Bodie, 245 U. S. 520 (1918) 12

Chicago, Milwaukee, St. Paul & Pacific R., In re, 155 F. 2d 489 (C.C.A. 7, 1946), *cert. den. sub nom.* Orton v. Group of Institutional Investors, ___ U. S. ___, 91 L. ed. 44 (Oct. 14, 1946) 21

Chicago, Milwaukee, St. Paul & Pacific R., In re, 145 F. 2d 299 (C.C.A. 7, 1944), *cert den. sub nom.* Park v. Group of Institutional Investors, 324 U. S. 857 (1945) 30

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940) 12

Cromwell v. County of Sac, 94 U. S. 351 (1876) 12

Denver & Rio Grande Western Reorganization, I. C. C. Finance Docket No. 11002 (Oct. 9, 1946) 19

Equitable Office Building Corp., In re, C.C.H. Bankr. Serv. ¶ 55,722 (Aug. 6, 1946) 24

Farmers National Bank v. Wilkinson, 266 U. S. 503 (1925) 12

Finney *v.* Guy, 189 U. S. 335 (1903) 25

Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R., 318 U. S. 523 (1943) 30

Grubb v. Public Utilities Commission, 281 U. S. 470 (1930) 12

Hazel-Atlas Glass Co v. Hartford-Empire Co., 322 U. S. 238 (1944) 23

Increased Railway Rates, Fares and Charges, 1946, Ex Parte No. 162 (I. C. C., Dec. 5, 1946) 29

Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U. S. 84 (1926) 13

I. C. C. v. Jersey City, 322 U. S. 503 (1944) 23

Kansas City Terminal R. v. Central Union Trust Co., 28 F. 2d 177 (C.C.A. 8, 1928), *cert. den.*, 278 U. S. 655 (1929) 25

TABLE OF CASES—Continued.

	Page
Louisville & Nashville R. v. Palmes, 109 U. S. 244 (1883)	25
North American Co. v. St. Louis & San Francisco R., 28 F. 2d 174 (E. D. Mo. 1926)	25
Nortz v. United States, 294 U. S. 317 (1935)	25
Old Colony Trust Co. v. Kurn, 138 F. 2d 394 (C.C.A. 8, 1943)	21
Palmer v. Massachusetts, 308 U. S. 79 (1939)	22
Pfister v. Northern Illinois Finance Corp., 317 U. S. 144 (1942)	17, 21, 24
Randel v. Brown, 2 How. 406 (1844)	13
Reconstruction Finance Corporation v. The Denver and Rio Grande Western Railroad Co., — U. S. —, 90 L. ed. 1134 (June 10, 1946; cited as Rio Grande Appeal)	*
State *ex rel.* Remick v. Clousing, 205 Minn. 296, 285 N. W. 711 (1939)	25
Stoll v. Gottlieb, 305 U. S. 165 (1938)	14
Stonega Coke & Coal Co. v. Price, 106 F. 2d 411 (C.C.A. 4, 1939), *cert. den.*, 308 U. S. 618 (1939), 116 F. 2d 618 (C.C.A. 4, 1940)	13
Tennessee v Condon, 189 U. S. 64 (1903)	13
United States v. Wabash R., 322 U. S. 198 (1944)	13
Vanston Bondholders Protective Committee v. Green, — U. S. —, 15 L. W. 4063 (Dec. 9, 1946)	13

*References too numerous for effective citation.

STATUTES AND OTHER AUTHORITY

	Page
Bankruptcy Act	
§75, 11 U. S. C., §203	17, 21
§77, 11 U. S. C., §205	*
§77B, 11 U. S. C., §207	16
§222, 11 U. S. C., §622	16
Judicial Code	
§240(a), 28 U. S. C., §347(a)	1
S. 1253, 79th Cong., 2d Sess.	7, 8
H. R. Rep. No. 1897, 72nd Cong., 2d Sess. (1933)	15
H. R. Rep. No. 1283, 74th Cong., 1st Sess. (1935)	15, 16
Sen. Rep. No. 1336, 74th Cong., 1st Sess. (1935)	15
Cyclopedia of Federal Procedure, Vol. 8, Sec. 3603 (2d Ed. 1943)	23
The Commercial and Financial Chronicle	27

*References too numerous for effective citation.

OPINIONS BELOW

No written opinion was delivered below, either in the District Court or in the Circuit Court.

The District Court order, containing an opinion (R. 14[1]), and its oral opinion upon entering the order (R. 77-83) are not reported.

The stay order entered in the Circuit Court (R. 27-28) is not reported.

JURISDICTION

The stay order of the Circuit Court was entered on November 2, 1946. The order of the District Court was entered on October 30, 1946. The Petition for a writ of certiorari was filed on November 12, 1946, and was granted on December 16, 1946.

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., §347(a)).

STATUTE INVOLVED

The issues involve Section 77(f) of the Bankruptcy Act (11 U. S. C., §205(f)), quoted in its entirety in the Appendix.

QUESTIONS PRESENTED

1. Is a judgment of this Court affirming the approval and confirmation of a railroad reorganization plan against an attack based on alleged changes of condition conclusive against a renewal of the same attack in the courts below based on the same alleged changes of condition?

2. Is it the intention of Section 77 that a reorganization

[1]References in this form are to the printed Transcript of Record in this case.

plan becomes final when its approval and confirmation are affirmed by this Court?

3. Is a petition for rehearing addressed to the discretion of the District Court so that its denial is not appealable?

In this brief we submit that each of these questions should be answered in the affirmative.

STATEMENT

1. The Original Decision of this Court.

This case is a sequel to *Reconstruction Finance Corporation, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, — U. S. —, 90 L. ed. 1134 (June 10, 1946, referred to herein as the Rio Grande Appeal). The issue here is whether this Court's decision in that case is to be carried out.

The litigation concerns a plan for the reorganization of The Denver and Rio Grande Western Railroad Company. The Plan was approved by the Interstate Commerce Commission on June 14, 1943.[2] In the Plan the Commission approved a new capitalization slightly larger, in aggregate face amount, than the total claims of underlying creditors, thus leaving a small amount of the new common stock for the old junior system bonds, known as the General Mortgage Bonds.[3] There was nothing left for unsecured creditors or stockholders. A controversy thus arose between the underlying creditors, on the one hand, who sought consummation of the Plan, and, on the other hand, the holders of the General Mortgage Bonds and the old stock, who sought modification of the Plan so as to provide additional securities for

[2] Transcript of Record in October Term, 1945, Nos. 278-282 (cited as Tr.) at p. 1.

[3] About 10% of all the new common stock to be initially issued, and equal to about 10% of the total claim of the General Mortgage Bonds.

them. The old corporation (herein called the Debtor) purported to speak for the General Mortgage Bonds as well as for the stock, though the former were actively represented by the Indenture Trustee.

The Plan was approved by the District Court for Colorado on October 25, 1943. From that approval, the Debtor appealed to the Circuit Court below. After submission of the Plan for acceptance or rejection by creditors, it was confirmed by the District Court on November 29, 1944. From that confirmation, both the Debtor and the Indenture Trustee for the General Mortgage Bonds appealed to the Circuit Court. On May 10, 1945, the Circuit Court reversed the orders approving and confirming the Plan, in order that more liberal treatment might be provided for the General Mortgage Bonds, though the Circuit Court approved the finding that the old stock had no value (Tr. 254). Judge Phillips concurred in result, though his separate opinion may imply that some provision should also be made for the old stock (Tr. 260).

On petition by the underlying creditors, certiorari was granted on October 8, 1945. The Debtor also petitioned for certiorari and, pending disposition of its petition, submitted all its contentions, both for the General Mortgage Bonds and for the old stock, by brief and oral argument. As shown in detail in the Argument below, these contentions included (*a*) a contention that the Plan should be denied effect because of a decline in interest rates, (*b*) a contention that the Plan should be denied effect because of the Geneva Steel Plant, and (*c*) a contention that the Plan should be denied effect because of an enhanced volume of business.

Rejecting all these contentions by an opinion covering the whole controversy, this Court on June 10, 1946, Frankfurter, J., dissenting, reversed the action of the Circuit Court, affirmed the orders of the District Court approving and confirming the Plan and remanded to the District Court for

further proceedings. At the same time the Debtor's petition for certiorari was denied.

The Debtor then filed in this Court a Petition for Rehearing on July 2, 1946, and a Supplemental Petition for Rehearing on August 15, 1946, repeating its original contention that reduced interest rates required that the Plan be denied effect, and further urging that all prior interpretations of Section 77 had been superseded by the discussions incident to the unsuccessful effort in the 79th Congress to amend the Act. These petitions, together with other petitions for rehearing filed by the General Mortgage Trustee, were denied on October 28, 1946. In the meantime, the mandate of this Court issued on August 27, upon denial of a third application by the Debtor for a stay.

2. Subsequent Proceedings Below.

Without awaiting this Court's action on the petitions for rehearing, the Debtor filed in the District Court on September 17 a petition (herein called the Petition) for an order (*a*) vacating the orders that approved and confirmed the Plan and (*b*) referring the case back to the Commission for formulation of a new plan (R. 1). The Petition, though based on alleged changes of condition, makes no allegation of any change (apart from the Congressional discussions referred to above) except the three contentions already submitted to this Court as shown above, namely, the contentions of (*a*) reduced interest rates, (*b*) Geneva Steel Plant operation and (*c*) enhanced volume of business. Insurance Group Committee, representing holders of underlying bonds, and the Indenture Trustees of underlying liens moved the District Court to deny the Petition, without hearing testimony, on the grounds that (*i*) the controversy had been closed by the final judgment of this Court and (*ii*) even if it were

competent for the Debtor to reopen the controversy, the Petition failed to state such a case as would justify reconsideration of the original determinations (R. 10-12). This motion was supported by the Reorganization Committee appointed pursuant to the Plan to carry it out.

Promptly after this Court's denial of the petitions for rehearing on October 28, the District Court took up these issues, on full argument of counsel. At the conclusion of the hearing, the District Court delivered an oral opinion (R. 77-83) to the effect that the Petition was without equity or merit, and entered an order (R. 14) denying the Petition on the express grounds that the controversy had been closed and that the Petition failed to state a case justifying reconsideration of the issues already determined.

Thereupon the Debtor filed a notice of appeal from this order to the Circuit Court (R. 17-18) and a motion for a stay of all action to carry out the Plan until final disposition of such appeal (R. 15-16). The motion was denied (R. 16).

3. How the Case Comes Up.

Immediately upon the entry of these two orders by the District Court, denying the Petition and denying a stay, the Debtor applied to the Circuit Court for a similar stay (R. 22-26). Judge Phillips heard this motion immediately. It was opposed by Insurance Group Committee and the Reorganization Committee on each of the grounds asserted in the District Court and on the further ground that there was no appealable case and the Circuit Court had no jurisdiction.

On November 2, 1946, Judge Phillips entered an order (R. 27-28) staying all action to consummate the Plan until final disposition of the appeal. The undersigned at once sought certiorari before judgment. It was granted on December 16, 1946.

SUMMARY OF ARGUMENT AND SPECIFICATION OF ERRORS

1. The judgment of this Court affirming on June 10, 1946, the approval and confirmation of the Plan and the denial by this Court on October 28, 1946, of all petitions for rehearing conclusively determined all issues sought to be raised again in the Petition, and the order of the District Court denying the Petition should therefore be affirmed or the appeal therefrom dismissed.

2. Independently of point 1 above, it is the intention of Section 77 that a reorganization plan becomes final when the orders approving and confirming it are finally affirmed on appeal.

3. Independently of points 1 and 2 above, the Petition, if permissible at all, was a petition for rehearing addressed to the discretion of the District Court and its denial, after appraisal of the factual situation, on the ground that it "fails to state a case which justifies reconsideration by this Court of the issues already determined" (R. 14) is not appealable and was plainly right.

The Circuit Court erred by acting, through its stay order, contrary to each of the above points.

ARGUMENT

1. The Judgment of this Court Closed the Controversy.

We do not in this point raise any question of statutory construction or any question as to the effect that might be given to changes of condition supervening after a judgment of this Court affirming the approval and confirmation of a plan under Section 77. We rely, for this point, only on the premise that a judgment of this Court is not open to attack in the lower courts on the same grounds already urged here,

but conclusively determines the issues of the case that it purports to determine.

For that purpose we look, of course, to the issues that were presented for decision by this Court in the Rio Grande Appeal. The fundamental issue was whether the Plan is fair and equitable, or whether a larger capitalization must be permitted in order to make greater provision for the General Mortgage Bonds and some provision for unsecured creditors and the holders of the old stock. In opposing the Plan, the Debtor was entitled to make, and did in fact make, each of the contentions now repeated in the Petition, and each of them was rejected by the opinion of this Court. This will be clear from an analysis of the Petition in which each of its contentions will be matched against the arguments originally made in this Court and the ruling of the Court thereon.

No matter of fact is alleged in Section 1 of the Petition, which merely describes the interests for which the Debtor purportedly acts, or in Section 2, which is a mere argumentative appeal for "justice." Section 3 deals only with the discussions relating to S. 1253 in the 79th Congress, and its veto, and again asserts that they repudiate all prior interpretations of the Act. But that likewise, we think, raises no question. Quite apart from the obvious reply that S. 1253 has been vetoed and thus has no effect, and also that by its own terms the bill did not purport to repudiate the rationale of Section 77 as proclaimed by this Court, but on the contrary had the express purpose of continuing it for the Rio Grande and a number of smaller carriers and proposed only to institute a new system for other roads, the issue has been disposed of by this Court. In its opinion in the Rio Grande Appeal the Court pointed out that criticisms had been voiced and changes had been suggested, but no different legislation had been enacted. "This situation," the Court concluded,

> "leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under Section 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of Section 77 read in the light of the contemporaneous [with its enactment] discussion in Congress." (90 L. ed. at 1143)

After the veto of S. 1253, the same contention was renewed in this Court by the Debtor's Supplemental Petition for Rehearing filed August 15, 1946. That petition was denied on October 28, 1946.

The main basis of the Petition is an alleged change of economic conditions affecting reorganization value. This is shown in Section 3 and developed in Section 4. Though making an opulent gesture to "all changes in the National economy, in the railway industry and in the earning power of the Debtor's properties" (R. 3), the Petition offers no concrete specification except those same three contentions already presented to this Court as summarized above. We review them in order.

(*A*) Decline in Money Rates (R. 4-7)

The Petition asserts that since confirmation of the Plan "interest and dividend rates" have declined by 1½% (R. 6) and support for this assertion is attempted by a table of 14 rail issues sold in the year ended November 1, 1945 (R. 6).

This table is but a selection from a longer list of similar nature set out, by resort to judicial notice, in the Debtor's Main Brief of February 15, 1946, in the Rio Grande Appeal (pp. 33-34). It was pertinent there because one of the Debtor's main attacks on the Plan at that time was this same decline in money rates. Thus it urged upon this Court (*id.*, p. 32) that the Plan had:

". . . become unfair and inequitable by reason of recent economic changes which are revolutionary.

"One of these changes is the radical lowering for the indefinite future of money rates."

From this the Debtor argued that, even if reorganization values were to be determined by earnings, a complete revaluation was required by this fact alone (pp. 32-33).

This Court in terms rejected that contention:

"We note also the contention that the possibility of a national income much higher and interest rates much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate." (90 L. ed. at 1145)

As if this were not enough, the Debtor renewed the same contention in its Petition for Rehearing of July 2, 1946, and in its Supplemental Petition for Rehearing of August 15, 1946. In the first of these petitions the Debtor said:

"The Respondents in their oral argument and on brief have urged as an independent ground for setting aside the Commission's Plan as well as a full justification for the rejection of the Plan by the General Mortgage Bondholders that very radical and permanent changes in money rates had rendered the Plan obsolete, unfair and unjust . . .

". . . These rates [in the plan] are at least 1½% above what can be justified in view of rates now being paid. . . This situation could not have been known or anticipated by the Interstate Commerce Commission and is an entirely new factor arising after the Plan had been found to be fair and equitable by the Commission . . ." (pp. 6-7)

In the second of these petitions the Debtor relied on a "radical change in the rates for the hire of money" as an

". . . economic change of such character as not only to justify but to require the judicial tribunal, whether the District Court, the Circuit Court of Appeals or the Supreme Court, when the economic change is brought to its attention to give pre-emptory [*sic*] relief by remanding the proceeding to the Commission." (p. 4)

Both petitions were denied on October 28, 1946.

(B) Geneva Steel Plant Operations.

The Petition asserts that the Geneva Steel Plant, located at Provo, Utah, on the lines of the Rio Grande and the Union Pacific, was built after the close of the Commission record, will be operated permanently and "destroys and renders worthless" the Commission's determination of future earning capacity (R. 8).

So far as this assertion deals with the record, it overlooks the testimony of one of the Debtor Trustees showing the construction and size of the Geneva Steel Plant (Tr. 995-6) and evidently contemplating that it would continue operation after the war in such manner as to make a substantial contribution to the earnings of the road (Tr. 1016).

But more importantly, the whole contention as to the Geneva Steel Plant was, like the argument of interest rates, one of the main bases for the Debtor's attack on the Plan before this Court. Judge Phillips, in his original opinion concurring in the Circuit Court's disapproval of the Plan, had taken judicial notice that the Geneva Steel Plant probably would continue in operation (Tr. 261) and his observations were quoted at length in the Debtor's Main Brief of February 15, 1946, in the Rio Grande Appeal (p. 37). In epitomizing this contention, the Debtor said (*id.*, p. 38):

"The development and construction of the great steel plant at Geneva is alone a reason for a complete revaluation of the Debtor's properties and the formulation of a new Plan. The establishment of this industry on the

Debtor's rails is certain to be revolutionary in its contribution to the new earning power of the Debtor's properties."

But this Court rejected all the contentions of the Debtor as to changed conditions, saying:

"Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154)

(*C*) Post-War National Income.

The Petition alleges a volume of business and an amount of national income "far in excess of any pre-depression income." (R. 9)

This, the fundamental premise of the Petition, was likewise the fundamental premise of the Debtor's case against the Plan in this Court. As it said to this Court in the Rio Grande Appeal (Main Brief of February 15, 1946, at pp. 33-34):

"In most of the pending cases (and this is conspicuously true in the case of the Debtor) there are other new factors [other than reduction in interest rates] which permanently elevate earning power to a level far above that which could possibly have been estimated or predicated upon historical or current earnings.

"Foremost among these factors . . . . is the permanent elevation of National income. . . . Economists will also testify . . . . that the industrial activity and expansion necessary to achieve such a National income would involve demands upon all forms of transportation even in excess of those created by the exigency of the War. This factor alone should preclude the use of his-

torical or pre-war earnings to write down a Debtor's property investment as protected by the law of the land."

This Court rejected that contention, in words already quoted, pointing out that these factors "were before the Commission when it made its earnings estimate" and that nothing in the Debtor's arguments "would justify a treatment different from that accorded" in the Plan, and adding, specifically on this point:

> "Even before the transportation difficulties of 1946, it was obvious that the Commission's judgment was being confirmed by events." (90 L. ed. at 1148-49)

So the Petition presents nothing new.

It is settled law that a judgment, as between the same parties on the same issue:

> ". . . is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."[4]

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[4] *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-3 (1876). The rule is stated in similar terms in *Bates* v. *Bodie*, 245 U. S. 520, 526-7 (1918), *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 478-9 (1930), and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378 (1940). And see *Farmers National Bank* v. *Wilkinson*, 266 U. S. 503, 506 (1925), to the effect that the decision of the appellate court, so determined, is binding on the lower court in subsequent proceedings.

That rule is decisive here. If changes of condition after confirmation of a plan by a District Court are ineffective, as we submit in point 2 below, to impair the rights of security holders under a confirmed plan, the entire Petition is irrelevant as a matter of law. If, on the other hand, and this is our point now, such changes of condition were relevant to the legal issue before this Court in the Rio Grande Appeal, then they were properly urged[5] by the Debtor in that appeal,[6] and the decision of this Court in that appeal conclusively decided them all. This would have been true, under the settled rule, even had they not been presented by the Debtor. It is all the more true seeing that the Debtor asked this Court to deal with the case on that basis, and this Court did so and decided all those contentions against the Debtor. Had this Court intended the same matters to be open to reexamination in further proceedings below, it knew how to say that its decision was without prejudice to further inquiry and adjudication below (*Independent Wireless Telegraph Co.* v. *Radio Corporation of America*, 270 U. S. 84, 86, 1926; *United States* v. *Wabash Railroad Company*, 322 U. S. 198,

[5]Courts of equity customarily shape their decisions so as to do equity at the moment of decision. *Randel* v. *Brown*, 2 How. 406 (1844); *Stonega Coke & Coal Co.* v. *Price*, 106 F. 2d 411 (C. C. A. 4, 1939), *cert. den.*, 308 U. S. 618 (1939), 116 F. 2d 618 (C. C. A. 4, 1940). See *Tennessee* v. *Condon*, 189 U. S. 64, 71 (1903). The Section 77 court is a court of equity. See *Vanston Bondholders Protective Committee* v. *Green*, — U. S. —, 15 L. W. 4063 (Dec. 9, 1946).

[6]Judicial notice is adequate to envisage those broad changes of conditions that are material in such an argument. Opinion of June 10, 1946, in the Rio Grande Appeal, taking judicial notice of market quotations (90 L. ed. at 1147), current earnings reports (90 L. ed. at 1149, n. 29) and current proceedings before the Commission (*id*).

201, 1944). That the Court made no such reservation shows that, what it did, it intended to be respected.

There can, accordingly, be no doubt that this Court's decision in the Rio Grande Appeal concludes the issues put by the Petition, so that it was not competent for any lower court to reexamine and redetermine the same issues. Otherwise its decisions would not conclude, but merely invite a new round of litigation. Even as among courts of equal rank, such a result would contravene important policies that have been formulated here as follows:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." (*Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525-6, 1931)

And more generally:

> "It is just as important that there should be a place to end as that there should be a place to begin litigation" (*Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 1938)

We submit, therefore, that without reference to the further arguments below, the order of the District Court denying the Petition should be affirmed or the appeal dismissed, and the cause be remanded to the District Court for consummation of the Plan.

2. Apart from Point 1, a Plan under Section 77 Becomes Final when Orders Approving and Confirming It Are Finally Affirmed on Appeal.

The decision of this Court in the Rio Grande Appeal is, as submitted in point 1 above, decisive in itself, as including the whole controversy presented by the Petition. But, if of interest, there is an independent legal ground that requires the same result, for it is the intention of Section 77 that, when orders approving and confirming a plan are finally affirmed on appeal, all controversy closes as to participations under the Plan.

However large may be the opportunities under Section 77 for litigation and delay, surely it must have been the Congressional design to provide some determinable time when the controversy closes. One of the declared objectives was, indeed, to avoid the delay that had characterized previous equity practice.[7] The Congress had before it[8] the history of public utility rate regulation, where the absence of any fixed date of decision repeatedly necessitated a new time of computation as the processes of regulation and review accomplished their leisurely course.

But, while business goes on forever, reorganizations are supposed to end, and participations in reorganization had historically been fixed at the single decisive moment of foreclosure sale. So the Congress may well have thought that the only way to provide a workable reorganization system was to prescribe a single decisive date as of which value for reorganization purposes was to be determined. In fact, the House Committee on the Judiciary amended the 1935 Amendment as originally introduced so as to provide that

[7] H. R. Rep. No. 1897, 72d Cong., 2d Sess. (1933) 5.

[8] See H. R. Rep. No. 1283, 74th Cong., 1st Sess. (1935) 3, and Sen. Rep. No. 1336, 74th Cong., 1st Sess. (1935) 3, commenting on the difficulty and expense of valuation.

a plan should not be submitted to stockholders, and thus should provide no participation for stockholders:

> "... if the Commission shall have found, and the judge shall have affirmed the finding, (a) that *at the time of the finding* the corporation is insolvent, or that *at the time of the finding* the equity of such class of stockholders has no value ..."[9]

The Act then proceeds, in subsection (f), to direct that:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof ... and all creditors ... Upon confirmation of the plan, the debtor ... shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto ..."

Those words are explicit and clear. They are sharpened by the reference "subject to the right of judicial review", for that implies that while the determination made by the confirmation order may be revised or upset on appeal, there shall not be any other way of reopening it, as by later pleading in the District Court like the Petition here involved. There is further support for the same result in the text of Chapter X providing for industrial reorganizations, for it contains an express provision that a plan may be modified "before or after its confirmation."[10] The inclusion of this provision in the industrial statute, and its omission from the railroad statute in the face of the industrial precedent, is strong corroboration of the Congressional intent that

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[9]Subsection (e), italics added. See H. R. Rep. No. 1283, 74th Cong., 1st Sess. (1935) 17-18.

[10]Section 222. Similar provision had been made in the prior Section 77B as subsection (f). Act of June 7, 1934, 48 Stat. 912. This was in effect at the time of the 1935 amendment to Section 77.

finally adjudicated orders of approval and confirmation close the controversy.

No argument against this result can be based on the next sentence of subsection (f) providing that

> "The property dealt with by the plan, when transferred and conveyed to the debtor . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities . . ."

These words are merely confirmatory of the legal situation created by the final confirmation order, and they can not be given the effect of postponing the moment of change in legal right until a turnover of the property without infringing the plain intention of the two next preceding sentences. At most, these confirmatory words create the familiar situation where an adjudication in equity conclusively determines the rights of the parties, though the formal modification of their prior legal rights may, as a matter of technique, be postponed until the actual execution of the decree. Thus, an agreement to sell land is specifically enforceable in equity, and a decree of specific performance conclusively determines the rights of the parties, though the old legal title may formally remain in the promissor until a deed is delivered in execution of the decree.

Such being the purpose of Section 77, the legislative intent, of course, controls, for the courts sit only to carry out the Act, and it is immaterial for present purposes that, under other sections prescribing reorganization procedure for other enterprises, the entire process of reorganization is

> ". . . open to reëxamination out of time by the District Court, in its discretion, and subject to intervening rights." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 1942, dealing with an agricultural composition under Section 75 of the Bankruptcy Act.)

The confirmation order affirmed by this Court is, by its terms, a complete and final disposition of the Debtor's case. The words are:

> "(b) The provisions of the Plan and of this Order shall forthwith become and be, and are hereby declared to be, final and binding, upon the Debtor and the Subsidiary Debtor, and all of their respective stockholders . . . and all creditors . . .
>
> "(d) The rights of all stockholders and creditors . . . shall be only those provided by the Plan.
>
> "(e) The Debtor . . . is, authorized and directed, and shall have full pow[illegible] and authority, to take all steps, and do all things, necessary . . . to put into effect and carry out the Plan and the orders of this Court relative thereto . . .
>
> "(i) This order shall become, and it is hereby declared to be, effective immediately upon its entry . . ." (Tr. 230, 232).

So Section 77 contemplates that a confirmation order shall be put in final form, and, when put in that form, shall finally conclude all questions of participation under the Plan. The Confirmation Order here involved purported to do just that. Its final affirmance by the orders of this Court entered June 10, 1946, and October 28, 1946, completed the adjudication of the controversy. It could not be reopened by the Petition, and the order of the District Court denying the Petition should be affirmed or the appeal dismissed. Any other rule would entitle the losing parties, always more disposed for delay than surrender, to successive appeals from each successive refusal to vacate the confirmation order. This would paralyze the Congressional scheme as a practical method to accomplish reorganizations.

These dangers are particularly real in the case of reorganizations under Section 77, where the consummation of

a plan is a task of such length and complexity. This is well illustrated by the circumstances of the present case, which may, so far as embodied in proceedings before the Commission or the District Court, be judicially noticed. They are briefly summarized in the following paragraph.

The Reorganization Committee provided in the Plan to effect its consummation was designated upon confirmation of the Plan by the District Court on November 29, 1944. On account of the pendency of appeals from the confirmation order, the Committee was inactive until the decision of this Court on June 10, 1946. Immediately thereafter the Committee formulated plans and adopted a program for consummating the reorganization. (Report and order, Interstate Commerce Commission, *Denver & Rio Grande Western Reorganization*, Finance Docket No. 11002, decided October 9, 1946.) The Reorganization Committee prepared drafts of the new mortgages, escrow agreements, exchange agency and bond scrip agency agreements, charter amendments, by-laws, merger agreement, supplemental indentures, releases, trustees' deeds and forms of new securities, and solicited bids from various corporate fiduciaries for their services as indenture trustees, depositaries, transfer agents, registrars, escrow agents, exchange and bond scrip agents, and for printing and engraving the new securities. On the basis of such bids the Commission, after hearing, entered an order fixing the maximum allowances of such expenses. (Order, Interstate Commerce Commission, October 9, 1946, *supra*.) Pursuant to the Plan a vote of Salt Lake Income Bondholders was taken on their acceptance or rejection of the proposal to modify their bonds so as to permit consolidation of the Denver & Salt Lake with the Rio Grande as a part of the consummation of the reorganization. Balloting began on July 30, 1946, and closed on October 28, 1946. The Circuit Court's stay order of November 2, 1946, by its terms pre-

vented any further action by the Reorganization Committee pursuant to the order of the District Court of November 29, 1944, confirming the Plan, and the mandate of this Court dated August 27, 1946, affirming it. Among petitions then pending in the District Court which had been set for November 6, 1946, and which were thereby stayed, were the following: (1) Petition for leave to file an application with the Commission for authority under Section 20a of the Interstate Commerce Act to transfer the properties of the Debtor and certain subsidiaries to the Reorganized Company, and to issue securities and assume obligations and liabilities as contemplated by the Plan; (2) Petition for an order on the report of the Reorganization Committee that more than 90% in aggregate principal amount of Salt Lake Income Bonds had accepted the proposal for modification of such bonds and unification of the affected subsidiary lines with those of the Debtor; and (3) Petition for an order approving the selection by the Reorganization Committee of the corporate fiduciaries, necessary to the consummation of the Plan. Proceedings under these pending petitions as well as all other final steps to consummate the Plan were thereby stayed. (R. 27-28)

If, after completion of judicial review of orders of approval and confirmation, the question of who may participate is still open to litigation, the time never comes when one is surely justified in undertaking the labor and expense prerequisite to consummating a plan.

3. Apart from Points 1 and 2, the Debtor's Petition, if Permissible at all, was a Petition for Rehearing and the District Court's Denial of it was Not Appealable, and in any case such Denial was Plainly Right.

As pointed out above, the Confirmation Order had declared that the provisions of the Plan are final and binding

and directed the Debtor to take all steps necessary to put it into effect. The Petition, on the other hand, asked the District Court for an order (*a*) "vacating and setting aside" the orders approving and confirming the plan and (*b*) "referring this proceeding back to the Interstate Commerce Commission for the formulation of a New Plan" (R. 9). Plainly, therefore, it was a petition for a rehearing.

It is settled law, in bankruptcy proceedings as elsewhere, that

> "An appeal does not lie from the denial of a petition for rehearing." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-50, 1942, under Section 75 of the Bankruptcy Act)

It is uniformly recognized that this rule applies under Section 77, and that motions to vacate or modify orders, as the Petition here was in terms, are petitions for rehearing within the meaning of this rule. *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394, 395 (C.C.A. 8, 1943); *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 155 F. 2d 489, 492 (C.C.A. 7, 1946), *cert. den. sub nom. Orton* v. *Group of Institutional Investors*, — U. S. —, 91 L. ed. 44 (Oct. 14, 1946). This was tersely put in the first of these cases as follows:

> "'Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable.' [citing authorities] A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion." (138 F. 2d at 395)

This rule is especially responsive to the policies of Section 77 as applied to an order confirming a Plan. There are, as submitted in point 2 above, strong indications of Congressional intention to make the confirmation order, when finally affirmed on appeal, dispositive of the controversy. But if an exception be implied by equity tradition, surely it should be no broader than the equity tradition, and the privilege of further review where there has occurred such a revolutionary change of conditions as would make the consummation of a plan unconscionable is thus a discretionary privilege of the District Court alone. It is the Judge of the District Court who has supervised the administration of the properties and it is his court that, under the Act, is made a part of the composite tribunal, closely "brigaded" with the Commission (*Palmer* v. *Massachusetts*, 308 U.S. 79, 87, 1939), to weigh and determine matters of fact. To its conclusions this Court attributes "especial weight" in view of his "familiarity with the reorganization" (Rio Grande Appeal, 90 L. ed. 1154).

It would be wholly inconsistent with the statutory scheme to permit the institution, at such a point, of an independent proceeding in the nature of the old bill of review, in such manner as to permit a sequence of new appeals from an order of denial. If any opportunity be permitted for reconsideration by the chancellor after fulfillment of the whole process of review contemplated in the Act by the Commission, the District Court, the Circuit Court and this Court, surely there could have been no intention to permit such reconsideration as an independent step subject to the same right of subsequent appeals.

While the statutory scheme alone is decisive against any theory of a bill of review as applied to an order confirming a plan under Section 77, we may briefly notice that, by the very tradition of a bill of review, such a bill will not lie, after an appeal, except upon consent of the highest appellate court

that has acted in the case, for courts sit to reach conclusions and not to create starting points for further litigation. So this Court has said, speaking of a bill of review to impeach a judgment that had been reviewed by an appellate court:

> "Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. . . The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court." (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 248, 1944).

This is accepted as standard practice:

> ". . . the bill itself is directed to the lower court, but it can only be entertained and determined by that court with the consent of the higher one, after the latter has reviewed the record; and this is true even when the ground of the bill is newly discovered evidence. . ." (*Cyclopedia of Federal Procedure*, Vol. 8, Sec 3603, pp. 352-3, 2d Ed. 1943)[11]

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[11] Nor can the Petition be called a "supplemental bill." That phrase was used in *Atchison, Topeka & Santa Fe R.* v. *United States*, 284 U. S. 248 (1932), to characterize a petition by the railroads to the Commission setting up the "radically different" situation that had come into being in 1931 as against 1929, when the record in a rate proceeding had been closed, and asking for a new determination of rates. The railroads are entitled to ask for a new determination of rates, and to obtain one as of right, at an, time when the circumstances warrant. But reorganizations, as we suggest in the text above, are expected to come to an end at some time. So far as the *Atchison* case required a rehearing of an administrative question, it was "promptly restricted . . . to its special facts" (*I.C.C.* v. *Jersey City*, 322 U. S. 503, 515, 1944), and is no longer authority.

So we come back to the point that the Petition is a petition for rehearing, and the denial of a petition for rehearing is not appealable.

If exceptions to that rule exist where the trial court re-examines the merits of its original decision (*Pfister Case*, above), or may be assumed where the trial court has clearly been governed by an erroneous conception of law or has failed to exercise its discretionary privilege to appraise the factual situation (*In re Equitable Office Building Corp.*, C.C.H. Bankr. Serv., ¶ 55,722, Aug. 6, 1946), they are inapplicable where, as here, the trial court does not reexamine the merits of its original decision, and does not proceed under any misconception of governing law, but exercises, upon full and careful consideration, its discretionary privilege to appraise the factual situation and finds that:

> ". . . the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined." (R. 14).

The action of the District Court is, as the *Pfister Case* shows, to be derived from its order, and there may, accordingly, be no need to go beyond and look at the facts on which the court acted. But that is unimportant here, because only a short statement of the facts will suffice to show that the discretion of the District Court was fully and reasonably exercised and, indeed, that its decision was plainly right, so that its order should be affirmed on that independent ground were this Court to consider that the preferable course. In the rest of this point, we look at the facts for this dual purpose.

The Petition was weighed, and rightly so, not only in the light of the whole record in these proceedings, but also in the light of all circumstances of which the District Court might properly take judicial notice, for a judge is never

compelled to accept as true the allegations of a pleading that he judicially knows to be untrue.[12] The doctrine of judicial notice is applied more broadly than usual in such situations because of the public policies involved and the fact that:

> "The administration of an insolvent operating property during receivership is so largely a practical business matter that the chancellor gains an experience and insight into the property, its condition, its needs and the relative attitude of interested parties which can never, in its entirety, be transmitted to the printed record." (*Kansas City Terminal R.* v. *Central Union Trust Co.*, 28 F. 2d 177, 184, C.C.A. 8, 1928, *cert. den.*, 278 U. S. 655, 1929).

Thus Walter H. Sanborn, C. J., said, in passing on objections to confirmation of a foreclosure sale to accomplish an equity reorganization of a railroad:

> "In the consideration of that question the court cannot divest itself of experience, nor of its knowledge of the course of proceedings in the receivership and . . . the operation of the railroad company, the income derived from the operation of the railroad . . . ; nor can it divest itself of the knowledge which comes from an acquaintance with the earnings of the property . . ." (*North American Co.* v. *St. Louis & San Francisco R.*, 28 F. 2d 174, E.D. Mo. 1926)

The oral observations of Judge Symes in denying the Petition are, therefore, of special interest (R. 77-83). He had heard argument for nearly a full day. His comments are addressed to changes of condition since his prior action. Those changes, he pointed out, contrary to the allegations of the Petition, were in fact adverse to the Debtor's conten-

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[12] *Louisville & Nashville R.* v. *Palmes*, 109 U.S. 244 (1883); *State* ex rel. *Remick* v. *Clousing*, 205 Minn. 296, 285 N.W. 711 (1939); see *Nortz* v. *United States*, 294 U. S. 317, 324-5 (1935); *Finney* v. *Guy*, 189 U. S. 335, 344 (1903).

tions, for gross revenues "have been steadily falling off ever since the conclusion of the war" (R. 78), and operating expenses had "greatly increased" without any "indication that they will not be increased in the future, and the probabilities are they will be" (R. 78). As a result, net railway operating income through August, 1946, was less than 2 million dollars, as compared with 12 million in the corresponding period of 1943, when the Commission acted (R. 78). In conclusion on that point he said:

> ". . . I fail to see any ground upon which it can be said that the earnings of this property will justify the issuance of any further securities. If they were issued they would be absolutely valueless because of the inability of the property to earn or pay any return thereon." (R. 78)

Commenting then on the Geneva Steel Plant, Judge Symes pointed out that the net earnings from that traffic would be inconsiderable in amount, even before reflecting the consequent loss of revenue on long-haul shipments from the East that would be displaced by such new business (R. 79). The road's competitive position would be seriously affected for the future, he went on to say, by the resumption of intercoastal shipping through the Panama Canal, which had been temporarily suspended by war conditions (R. 79-80).

He was, in fine, of the view that the Petition had no equity or merit because

> ". . . most, if not all, of the questions presented and raised in this petition have been thoroughly rehashed time and time again, not only before the Commission,

> but in this Court . . . the decision of that [Circuit] Court reversing the opinion of this Court presented these questions very squarely to the Supreme Court . . . All legal remedies have been exhausted, and the objectors have at all times had a fair hearing before the Commission and the Court, with a full opportunity to be heard in making any kind of a record or argument they wanted, and it seems to me it is time for the opposition to this plan to bow to the inevitable." (R. 81-82)

In the oral argument before Judge Symes, it had been pointed out that any contention of a decline in interest rates since this Court's decision in the Rio Grande Appeal on June 10, was manifestly counter to the plain facts of experience. On June 10, 1946, the Dow-Jones average of 10 first-grade rail bonds was 117, and the Dow-Jones average of 10 second-grade rail bonds was 101. On October 30 they had declined to 110 and 89, respectively. This reflects, of course, a substantial rise in interest rates. The when-issued market quotations for the new securities under the Plan had also shown a marked deterioration. On June 10, 1946, the bid for the new First's was 101 and for the new Income's 79. On November 1 the corresponding figures were 90 and 59.[13] So clearly the Petition failed to state any case on that point that might justify reconsideration.

Nor could there be any serious suggestion that there had been any improvement in economic conditions or prospects since the decision of this Court on June 10, 1946, or since the earnings period considered in the Court's opinion. In support of its conclusion, this Court took judicial notice of the operating reports of the Rio Grande for January and February of 1946 and pointed out that operating revenues

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[13]All these quotations are from "The Commercial & Financial Chronicle" of June 10, 1946, June 17, 1946, and November 4, 1946.

for that period were 18% below the corresponding period of 1945 (90 L. ed. at 1149, n. 29). Operating revenues of the Rio Grande through August of 1946, which were in the record before the District Court, show a decrease of 37% under the corresponding period of 1945, or twice the percentage decline considered in this Court's opinion. The operating ratio in the first 8 months of 1946 was 86% as compared with 61% in the corresponding period of 1945 and 69% for the corresponding period of 1944, immediately preceding the Confirmation Order. There has been no decrease in cost levels since June 10, and they are an even more fundamental cause of the drastic decline in railroad earning power. On the contrary, it is a fact of common knowledge, and the Court may judicially notice, that the trend of costs has continued upward. The large wage increases of January 1, 1946, the addition made to them by the Crosser Bill of July 31, 1946 (raising payroll tax deductions), and the sharp increases during 1946 in the various standard indices of consumers' prices and wholesale prices are familiar to all.

In the opinion of June 10 this Court took judicial notice of the petition filed by the railroads before the Commission on April 15, 1946, for increased freight rates, and quoted from the petition as to the "critical" situation of the railroads in view of the great increases in wages and in costs and material and supplies and the decline in traffic and revenues from the war-time peak. The Court then concluded:

> "The Denver apparently did not vary greatly from this over-all picture." (90 L. ed. 1149, n. 29).

The fundamentals of this situation are in no way changed by the Commission's recent decision in that proceeding ap-

proving a rate increase of 17.4%."[14] It is clear from the Commission's Report (sheet 5) that the authorized increase is designed to be less than half the aggregate increase in operating costs resulting from the rise, already experienced since 1939, in wages and in prices of material and supplies. No new era of earnings can be said to have opened when the railroads are reimbursed for only part of the increases in costs already sustained and must still struggle by increased efficiency to achieve and maintain the level of earnings for which the Plan hopes.

All these and other circumstances, except only the Commission's increased rate decision, which was rendered after the hearing below, were reviewed at length in argument by both sides before the District Court. It is clear from the course of the hearing (R. 32 *et seq.*), the oral observations of Judge Symes (R. 77-83) and the order in which his conclusions were finally embodied (R. 14), that there was no abuse of discretion on his part, but, on the contrary, that his discretionary privilege to appraise the factual situation was carefully and reasonably exercised.

The case, therefore, is governed by the classic rule already stated that from the denial of a petition for rehearing, no appeal lies. The Debtor's appeal, therefore, should be dismissed. Or, in the alternative, the decision of the District Court that no changes of condition had occurred except changes of an adverse nature was plainly right, and its order of denial should be affirmed. As the Seventh Circuit Court of Appeals said in dismissing an attempted further

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[14] *Increased Railway Rates, Fares and Charges, 1946, Ex Parte No. 162*, December 5, 1946, and the Commission's press release on that decision dated December 6, 1946.

appeal by the debtor corporation in the Milwaukee Reorganization after the decision of this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523 (1943):

> ". . . any further review would be little more than an idle and useless ceremony. It is hardly within the range of possibility that appellants could benefit thereby. On the other hand, the delay occasioned would prove detrimental to the public interest and prolong the goal which has long been sought, that is, the final consummation of the Plan." (*In re Chicago, Milwaukee, St. Paul & Pacific R.*, 145 F. 2d 299, 304, 1944, *cert. den. sub nom. Park* v. *Group of Institutional Investors*, 324 U. S. 857, 1945, *reh'g. den.* 325 U.S. 895, 1945)

CONCLUSION

On the ground that this Court's decision of June 10, 1946, on the merits of the Rio Grande Appeal, and its denial of petitions for rehearing on October 28, 1946, adjudicated all the issues presented by the Petition, we submit that the Petition was purely repetitive and interposed for mere delay and the order of the District Court denying the Petition should be affirmed or the appeal dismissed, so that this reorganization, already so long delayed, may now move forward to completion in accordance with the mandate of this Court. Since that ground alone is decisive, the case need not be decided on any broader grounds. But on three other grounds, each alone decisive, the same result is required, first, that Section 77 intends the controversy over a plan to be closed by final affirmance of orders approving and con-

firming the plan, second, that the denial of a petition for rehearing affords no ground for further appeal, and, third, that the decision of the District Court was plainly right.

Dated December 31, 1946.

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APPENDIX

Section 77(f) of the Bankruptcy Act, as Amended.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination

of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of Title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY REORGANIZATION

When Issued Prices and Values Under the Plan

	When Issued Prices (*) 1946 High	Low	(**) Jan. 2, 1947
First Mortgage 3-4s, 1993	102¼	90½	90
Income 4½s, 2018	86	53½	61
Preferred Stock	77¼	40	51
Common Stock	40¼	17	17½

	(#) Realization Per cent of Claim on bases of— High	Low	Jan. 2, 1947
Western Trusts	97.94%	80.69%	82.31%
Western Consols	76.41	41.09	50.66
Eastern Consols	71.30	45.93	49.84
R. & I.'s	64.53	39.19	42.62

SOURCE

(*) Monthly closing prices (average between bid and ask) from Bank and Quotation Record, published by Commercial and Financial Chronicle.

(**) Average between bid and ask prices from Wall Street Journal Jan. 3, 1947.

(#) The new securities allotted in the Plan to each old bond are taken at the indicated prices and their total is then expressed as a percentage of principal and interest on that bond to the stated effective date of the Plan on January 1, 1943.